



DEPARTMENT OF THE NAVY
OFFICE OF CIVILIAN HUMAN RESOURCES
614 SICARD STREET SE SUITE 100
WASHINGTON NAVY YARD, D.C. 20374-5072

NOV 21 2011

The Honorable Leonard Lance
Member, United States House
of Representatives
23 Royal Road, Suite 101
Flemington, NJ 08822

Dear Mr. Lance:

Thank you for your letter of October 12, 2011, to the Department of the Navy (DON), Office of Legislative Affairs on behalf of your constituent, Mr. (b) (6). He is a former Police Officer, GS-0083-06, at the Naval Support Activity (NSA), Lakehurst, New Jersey. Mr. (b) (6) previously requested assistance to determine if he is entitled to back pay as part of the resolution of the unfair labor practice (ULP) charges filed by the National Association of Government Employees Local R2-84 in 2005 and again in 2008. We responded to your previous inquiry on behalf of Mr. (b) (6), on May 18, 2011. He is again requesting assistance to obtain backpay he believes resulted from a "court" decision.

Mr. (b) (6) request for assistance is essentially no different than the previous inquiry. The new information he provides is a copy of the "court" decision upon which he rests his claim for backpay. I will address in more detail the "court" decision provided by Mr. (b) (6). Hopefully, this will enable a better understanding of the resolution of the whole matter. I would like to preface my discussion of the "court" decision by reiterating some background information from our May 2011 response. Specifically, in February 2005 Mr. (b) (6) union, the National Association of Government Employees (NAGE), Local R2-84 filed two unfair labor practice charges (ULPs) with the Federal Labor Relations Authority (FLRA) against the Navy at NSA Lakehurst. In these ULP's, the union alleged that Lakehurst had violated two provisions of the collective bargaining agreement by not paying the police officers ½ hour of overtime each day and requested that all police officers receive backpay as remedy. The FLRA, in May 2005 and again in December 2005 (on appeal from the union) found that Lakehurst had NOT (emphasis added) committed any unfair labor practice and dismissed the union's ULPs, thus denying the backpay claim for the police officers.

With regard to the "court" decision, this decision was actually made by a Federal sector, Federal Mediation & Conciliation Service (FMCS), labor arbitrator in response to a February 2008 grievance filed by NAGE, Local R2-84 on behalf of Mr. (b) (6) and a number of other police officers employed at NSA Lakehurst. When the grievance could not be resolved locally, it was referred to an arbitrator with FMCS. This grievance raised the same claims and requested the same remedy as the ULP charges filed by the union and denied by the FLRA in 2005, as noted above.

Despite being made aware of the FLRA's 2005 actions during the arbitration process, the arbitrator, in his February 2010 decision and award found that the Navy had violated the collective bargaining agreement with NAGE, Local R2-84 and awarded retroactive backpay to the police officers. Subsequently, the Navy filed an exception (i.e., an appeal) to that decision and award with the FLRA in May 2010 on the basis that the arbitrator's award violated Federal labor law, specifically, Title 5 United States Code (USC) 7116 (d). In pertinent part, 5 USC 7116 (d) provides that a grievance or complaint may be filed as an unfair labor practice charge under appropriate statutory procedures or as a grievance under a negotiated grievance procedure, but cannot be filed under both procedures (emphasis added).

The FLRA, in July 2010 sustained the Navy's appeal and set aside (i.e., reversed) the arbitrator's decision and award, finding that the arbitrator improperly assumed jurisdiction of the case in violation of 5 USC 7116 (d) thus invalidating the backpay awarded by the arbitrator. Mr. (b) (6) union did not further appeal this case. The end result for Mr. (b) (6) and the other involved police officers is that the backpay awarded by the arbitrator was negated by the FLRA decision in July 2010, thus no entitlement to backpay exists. I hope this provides clarity to the whole matter raised by Mr. (b) (6) and a clearer understanding of the final outcome. Enclosed, please find a copy of the FLRA decision (66 FLRA No. 193) for Mr. (b) (6) records.

I hope this information is helpful in responding to Mr. (b) (6). Further correspondence on this case should be addressed to me, ATTN: Code 016/pf/550.

Sincerely,

(b) (6)

Director, Assessment and
Workforce Inquiries Division

Enclosure (1)

**FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.**

**UNITED STATES DEPARTMENT OF THE NAVY
NAVAL AIR ENGINEERING STATION
LAKEHURST, NEW JERSEY
(Agency)**

and

**NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES
LOCAL R2 - 84
(Union)**

0-AR-4638

DECISION

July 21, 2010

**Before the Authority: (b) (6), Chairman, and
(b) (6) and (b) (6), Members**

I. Statement of the Case

This matter is before the Authority on an exception to an award of Arbitrator (b) (6) filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exception.

The Arbitrator found that the Agency violated the parties' collective bargaining agreement by refusing to compensate police officers for their on-duty lunch periods in accordance with the Fair Labor Standards Act (FLSA). For the following reasons, we set aside the award.

II. Background and Arbitrator's Award

Article 34, Sections 1 and 2 of the parties' agreement establish a workday of eight and one-half hours for civilian police officers, including one half-hour compensated as overtime.¹ *See* Award at 4. Under those provisions, officers were permitted to eat "on-the-clock" without a designated lunch break. *Id.*

In November 2004, the Agency advised the Union that these agreement provisions were unlawful, that the work shift would begin to include an unpaid half-hour lunch period, and that the "previously paid one-half hour of daily overtime would be eliminated." *Id.* at 2.

In February 2005, the Union filed unfair labor practice (ULP) charges alleging that, by eliminating the paid lunch period, the Agency had repudiated Article 34, Sections 1 and 2 of the agreement in violation of the Statute. *Id.* The Authority's Regional Office dismissed the charges, and the Authority's Office of General Counsel denied the Union's subsequent appeal of that dismissal. *Id.*

The Union filed a grievance in February 2008 alleging "[r]epudiation of elements of the overall negotiated agreement[.]" and that "Article 34 . . . , Sections 1 and 2 have been completely ignored[.]" Exception, Attach., Ex. H at 2. The Union also filed a handwritten addendum to the grievance stating that "[t]he Union's position is that Management is in violation of the bargaining agreement." *Id.* at 3. The grievance was unresolved and submitted to arbitration. Award at 3.

At arbitration, the parties stipulated to the following issue: "Whether the civilian police officers . . . are entitled to 'standby' pay, or, are, in an on-call status (i.e., unpaid) during their one-half hour 'unpaid' lunch period?" *Id.* The Arbitrator found that the officers were required to be "on-duty" during their lunch period and, therefore, were entitled to compensation under Article 12, Section 12 of the parties' agreement.² *Id.* at 14-15. The Arbitrator noted that the Agency failed to raise any procedural or arbitrability questions regarding the Union's right to bring a claim. *Id.* at 15.

¹ Article 34, Section 1 of the parties' agreement states, in pertinent part: "Hours of work . . . will be eight and one-half hours per day. . . . Employees shall have no designated lunch break, but will be permitted to eat lunch on the clock." Exception, Attach., Ex. B at 1. Article 34, Section 2 of the parties' agreement states, in pertinent part: "[T]he basic workweek will consist of five consecutive work days of eight and one-half hours each. Any time over eight hours in a day will be compensated as overtime in accordance with applicable laws and regulations." *Id.*

² We note that Article 12, Section 12 of the parties' agreement specifically requires the Agency to comply with the FLSA.

III. Positions of the Parties

A. Agency's Exception

The Agency argues that the award is contrary to § 7116(d) of the Statute.³ Specifically, the Agency contends that the Union's ULP charges and grievance are based on the same legal theory that the Agency repudiated the parties' agreement. Exception at 9-10. The Agency also contends that, although it failed to raise § 7116(d) at arbitration, this does not preclude the Authority from considering the issue because challenges to subject-matter jurisdiction can be raised at any time. *Id.* at 10-11.

B. Union's Opposition

The Union contends that the award is not barred by § 7116(d) of the Statute because its grievance and ULP charges advance two different legal theories. Opp'n at 7-8. The Union concedes that "the initial grievance documents did claim repudiation," but argues that § 7116(d) did not bar the grievance because the Union: (1) did not pursue the repudiation theory at arbitration; (2) did not make a repudiation argument in its brief to the Arbitrator; and (3) added an addendum to the grievance that presented only a breach-of-contract theory. *Id.*

IV. Preliminary Issue

It is undisputed that the Agency did not raise § 7116(d) before the Arbitrator. However, the Authority has held that a party's failure to raise § 7116(d) before an arbitrator does not preclude the Authority from addressing § 7116(d) issues. *See EEOC*, 48 FLRA 822, 827 (1993). In this connection, the Authority has held that "[e]xceptions that challenge an arbitrator's jurisdiction under the Statute may be considered by the Authority regardless of whether the jurisdictional argument was made to the arbitrator." *Id.* at 827-28 (citing *U.S. Dep't of Justice, Immigration & Naturalization Serv., El Paso, Tex.*, 40 FLRA 43, 51-52 (1991)). Accordingly, we will consider the Agency's § 7116(d) exception.

V. Analysis and Conclusions

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award *de novo*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of *de novo* review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

³ Section 7116(d) of the Statute provides, in pertinent part, that "issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice . . . , but not under both procedures." 5 U.S.C. § 7116(d).

As set forth above, § 7116(d) of the Statute provides, in pertinent part, that “issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice . . . , but not under both procedures.” In order for a grievance to be barred from consideration under § 7116(d) by an earlier-filed ULP charge: (1) the issue that is the subject matter of the grievance must be the same as the issue that is the subject matter of the ULP charge; (2) the issue raised in the grievance must have been earlier raised under the ULP procedures; and (3) the selection of the ULP procedures must have been at the discretion of the aggrieved party. *See, e.g., U.S. Dep’t of Health & Human Servs., Indian Health Serv., Alaska Area Native Health Servs., Anchorage, Alaska*, 56 FLRA 535, 538 (2000) (HHS). In determining whether a grievance and a ULP charge involve the same issue, the Authority examines whether the ULP charge and the grievance arose from the same set of factual circumstances and whether the legal theories advanced in support of the ULP charge and the grievance are substantially similar. *See id.* In this connection, the Authority has held that a ULP charge alleging a contract repudiation in violation of the Statute raises a sufficiently distinct theory from a grievance alleging a mere breach of a contract, even when both matters arise from the same set of facts. *See, e.g. U.S. Dep’t of Labor, Wash., D.C.*, 59 FLRA 112, 115 (2003) (Chairman (b) (6) concurring & Member Armendariz dissenting).

There is no dispute that: (1) the ULP charges were filed prior to the grievance; (2) the selection of the ULP procedures was made at the discretion of the aggrieved party, i.e., the Union; and (3) the ULP charges and grievance arise from the same set of factual circumstances. Consequently, the specific issue before the Authority is whether the grievance and ULP charges raise substantially similar theories.

The Union concedes that the “initial grievance documents did claim repudiation,” but asserts that it did not pursue that theory at arbitration. Opp’n at 7. However, an issue is “raised” within the meaning of section 7116(d) at the time of the filing of a grievance or a ULP charge, even if the grievance or ULP charge is subsequently withdrawn and not adjudicated on the merits. *See, e.g., HHS*, 56 FLRA at 538. As the grievance raised repudiation at the time of filing, it raised the same legal theory as the ULP charges. Accordingly, we find that § 7116(d) barred the grievance, and we set aside the award.

VI. Decision

The award is set aside.

**FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.**

**UNITED STATES DEPARTMENT OF THE NAVY
NAVY AIR ENGINEERING STATION
LAKEHURST, NEW JERSEY
(Agency)**

and

**NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES
LOCAL R2-84
(Union)**

0-AR-4638

STATEMENT OF SERVICE

I hereby certify that copies of the Decision of the Federal Labor Relations Authority in the subject proceeding have this day been mailed to the following:

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

(b) (6)
Agency Representative
Commander Navy Region Mid-Atlantic
Northeast Area Office, N01L
690 Peary Street
Newport, RI 02841

(b) (6)
Union Representative
NAGE
601 North Fairfax Street, Suite 125
Alexandria, VA 22314

FIRST CLASS MAIL

(b) (6)

Deputy Director, LERD
DoD, Civilian Personnel Mgmt. Serv.
1400 Key Blvd., Suite B200
Arlington, VA 22209-5144

(b) (6)

Arbitrator
P.O. Box 726
Jenkintown, PA 19046

DATED:

July 21, 2010
WASHINGTON, DC

(b) (6)

Legal Clerk